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In the Matter of Adjustment of Rates For Noncommercial Educational Broadcasting Compulsory License	))))	Docket No. 96-6 CARP NCBRA

Public Broadcasters' Reply to the Petition of the American Society of Composers, Authors and Publishers to Modify the Report of the Arbitration Panel, Dated July 22, 1998 and the Petition of Broadcast Music, Inc. to Set Aside or, in the Alternative, Modify the Panel Report Dated July 22, 1998

Pursuant to 37 C.F.R. § 251.55(b), the Public Broadcasters file this Reply to the Petition of the American Society of Composers, Authors and Publishers To Modify The Report Of The Arbitration Panel, Dated July 22, 1998 ("ASCAP Pet.") and the Petition of Broadcast Music, Inc. To Set Aside Or, In The Alternative, Modify The Panel Report Dated July 22, 1998 ("BMI Pet.").

As set forth in the Public Broadcasters' Petition To Modify The Report of The Copyright Arbitration Royalty Panel ("PB Pet."), much of the Panel's determination was based upon a reasoned consideration of the evidence. At bottom, the Panel's determination reflects its agreement with the fundamental premise that an adjustment to the fees previously in effect between the parties themselves to account for changes in music use and economic circumstances is the soundest and most logical method for determining a reasonable rate under Section 118 of the Copyright Act of 1976 ("the

Act"). The Public Broadcasters' Petition is narrowly directed to the legal error committed by the Panel in constructing the "reasonableness" standard so as to give inadequate consideration to the prior voluntary agreements reached between the parties, as recently as 1992, instead necessitating adjustments to twenty-year-old fees resulting from the 1978 CRT proceeding. Whereas the parties themselves, over the past twenty years, have at the bargaining table agreed upon five-year fee increases averaging 13-15 percent (see PB Exhs. 11-16)[1], the Panel's reversion to the 1978 ASCAP benchmark calls for what the Public Broadcasters believe is an unwarranted 44 percent increase in fees over the 1993-1997 negotiated rates.

The ASCAP and BMI Petitions, in stark contrast, attack the Panel Report root and branch, assigning dozens of asserted errors of law and fact covering virtually every aspect of the Report. Economically, ASCAP and BMI continue to shoot for the moon, maintaining the patently unreasonable position that the Public Broadcasters should sustain rate increases of between 170 and 290 percent over the prevailing fee levels (the former if their proposed "adjustments" to the Panel's methodology were adopted; the latter if their commercial fee analog were to supplant the Panel's methodology in its entirety). The Panel's Report rejected such an astonishing increase in fee levels as economically unreasonable based on a factual record that overwhelmingly supports that conclusion. Insofar as the ASCAP and BMI Petitions reiterate their trial proposals -- which ran from all history involving this industry to the disparate license experience

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1 Unless otherwise noted herein, the citation conventions set forth in the Public Broadcasters' Petition have been adopted for purposes of this Reply.

ASCAP and BMI have had with for-profit broadcasters operating in fundamentally different economic markets, and which are not subject to §118's compulsory licensing provisions -- the same comprehensive record on which the Panel relied to reject those proposals following trial requires the Librarian to do the same here. Insofar as ASCAP and BMI attempt to obtain fundamentally the same windfall via asserted mathematical "corrections" to "methodological errors" in the Panel's chosen approach to fee-setting, the Librarian again should reject these efforts as unwarranted either legally or factually.

In Point I below we address the scattershot attacks upon the Panel's methodology leveled by ASCAP and BMI. We there establish that the findings challenged by ASCAP and BMI are, in fact, neither arbitrary nor contrary to law. In Point II, we address ASCAP's and BMI's reiteration of their trial positions that the Public Broadcasters should be treated no differently than commercial broadcasters for purposes of calculating their performance rights license fees. Specifically, we identify the plethora of record evidence which demonstrates that Public Broadcasters operate in a distinct marketplace with markedly different economic characteristics, thereby rendering ASCAP's and BMI's comparisons to the commercial marketplace wholly inapposite. In Point III, we briefly address ASCAP's assertion that the Panel erred in its allocation of costs among the parties.

ARGUMENT

POINT I

ASCAP'S AND BMI'S ATTACKS ON THE PANEL'S METHODOLOGY ARE UNFOUNDED

ASCAP and BMI attack the Panel for presuming to develop and rely upon a methodology other than one which they propose. See BMI Pet. at 17-25; ASCAP Pet. at 3, 21-25. But rather than such approach being inappropriate (let alone a deprivation of "due process"), the Copyright Office has noted that "it is within the CARP's discretion to determine whether the proposed methodologies, or another of the CARP's own determination, is the best means of fulfilling the statutory obligation of setting rates and terms for the section 118 license." Order in Docket No. 96-6 CARP NCBRA at 8 (December 9, 1997). To conclude otherwise would deprive the Panel of the flexibility it requires in the rate-setting process and create the potentially anomalous requirement that a panel be bound to adopt solely one or another party's chosen methodology in establishing reasonable fees.

ASCAP and BMI nonetheless proceed to pick apart virtually every facet of the Panel's chosen methodology, label the Panel's judgments "arbitrary," recalibrate the methodology to maximize the fees payable to ASCAP and BMI, and thereby seek license fees (albeit ostensibly within the Panel's methodological framework) which in combination closely approximate those sought and explicitly found to be unreasonable at trial. We expose below the fallacious reasoning underlying this aspect of ASCAP's and BMI's Petitions.

A. The Panel's Reliance Upon the 1978 CRT Determination as a Benchmark

1. ASCAP's and BMI's professed surprise at the Panel's adoption of the 1978 Copyright Royalty Tribunal ("CRT") decision as a benchmark is untenable. The CRT's 1978 decision, virtually by definition, has formed a backdrop to this proceeding since its inception. Indeed, ASCAP specifically relied upon the very fee outcome of that proceeding as a benchmark rate for purposes of its own "trending" formula. See Boyle, Final Rev. Written Dir. at 9-11. That the Panel adopted a different set of adjustment criteria than those proposed by ASCAP, and that BMI never chose to address the merits of the CRT decision either as the benchmark or in response to ASCAP's trending methodology, hardly constitute bases for attacking the Panel's methodology.

2. There is no more substance to BMI's claim of error insofar as the 1978 fee established by the CRT pertained solely to ASCAP. See BMI Pet. at 18-20. The issue is not whether BMI was or was not a party to the prior proceeding. It is instead whether a fee emanating from that proceeding forms a reasonable benchmark for overall fee-setting here. In that regard, the Panel specifically found that the valuation of one society's repertory is pertinent to establishing the value of the other. As the Panel correctly reasoned:

> We find no credible evidence that the music contained in ASCAP's repertory is more, or less, intrinsically valuable than the music in BMI's inventory. Indeed, we can not envisage a means for performing such a measurement.... The protracted history of voluntary license agreements between ASCAP, BMI and Public Broadcasters reveal a consistent pattern of dividing the total license fee "pie"... purely on the basis of music share.

Report at 35.

The Panel's reasoning on this issue is well supported by logic and the record, and should not be disturbed by the Librarian. Illustratively, BMI's alternative fee proposal in this proceeding was premised on the notion that BMI was entitled to a fee directly proportionate to its relative share of music use vis-à-vis ASCAP. See BMI PFFCL at ¶¶ 158-160. In the circumstances, BMI can scarcely be heard to complain of a methodology which accomplished precisely BMI's objective.

3. BMI's further assertion that the rate established by the CRT in 1978 was some form of "subsidy" that was not intended to be fair-market approximating is patently frivolous. See BMI Pet. at 21-26. The CRT specifically noted that its determination reflected the understanding that "[b]oth the Copyright Act and equity require that [composers] receive reasonable compensation for the use their works by public broadcasting." Copyright Royalty Tribunal Final Rule, 43 Fed. Reg. 25,068, 25,068 ("178 CRT Decision"). Dispositively, the CRT "determined that a payment of $1,250,000 per year is a reasonable royalty fee" for ASCAP. Id. at 25,069 (emphasis added).[2]

BMI's speculation that the uncertainty over commercial broadcast fees as of 1978 caused the CRT to understate the fair-market value of the ASCAP repertory to the Public Broadcasters is just that. See BMI Pet. at 25-26. There is nothing in the CRT decision which supports such a conclusion. In any event, the record adduced in this proceeding

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[2] Indeed, ASCAP acknowledged as much in 1979 when its General Counsel advised the CRT that "without the compulsory license, a federal judge would have fixed a reasonable fee under the Amended Final Judgment in U.S. v. ASCAP. There is no reason to suppose that the Court's decision would have been very different from the CRT's." In the Matter of : Public Broadcasting Rate Proceedings, Comments of ASCAP (Dec. 17, 1979); PB Ex. 6X.

demonstrates that, whereas at the time of the CRT's ruling, ASCAP's license fees from commercial television represented some 0.83 percent of those broadcasters' revenue, over time — with the final fee certainty BMI laments was lacking earlier — that percentage dropped precipitously, to 0.44 percent by ASCAP's own estimate as of today. Boyle, Tr. at 1889-90, 1931. By the logic of BMI's argument, the CRT ruling if anything overstated the fair-market value of the § 118 rights involved, to the extent it used as a reference point a commercial fee benchmark which thereafter declined by some 47 percent.

4. BMI's related argument that the fee resulting from the 1978 CRT proceeding was somehow "experimental," and "non-prejudicial" (BMI Pet. at 23-26) is equally lacking in substance. As the Panel correctly noted, such language in the CRT decision as suggests that its approach to fee-setting was intended to be non-precedential was not a disclaimer as to the then-reasonableness of the rate it had set.[3] Report at 25, n.36.

5. In attacking the Panel's reliance on the 1978 CRT decision, BMI completely ignores the fact that the Panel confirmed the reasonableness of its fee setting methodology by reference to BMI's own agreement with the Public Broadcasters in 1978 – an agreement which the Panel noted contained neither a no-precedent nor a non-disclosure clause. Using this alternative benchmark, the Panel generated a fee of $2.082

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[3] Both ASCAP and BMI affirmed at trial the precedential value of the 1978 CRT proceeding. See Tr. at 4018-4020 (Mr. Schaeffer), 4107-08 (Mr. Kleinberg). BMI's counsel, Mr. Kleinberg, specifically noted (in colloquy omitted from BMI's Petition, see BMI Pet. at 20) that "it certainly seems to me that you couldn't challenge that rate for that period of time in another proceeding . . . it represented a determination of what the rate should be under the criteria employed by the CRT for ASCAP in 1978." Tr. at 4107-4108.

million for BMI (as opposed to the $2.123 million arrived at under the Panel's principal approach). Report at 36-38.

B. The Panel's Adjustments to the 1978 Fee

The ASCAP and BMI Petitions launch a full-scale attack on virtually every material aspect of the methodology by which the Panel adjusted from the 1978 CRT rate to derive fees for the 1998-2002 license period. The "corrections" proposed by ASCAP and BMI (including the embrace of arguments inconsistent with, if not in direct contradiction of, positions they espoused at trial) would nearly double the fee levels determined by the Panel to be reasonable (some $50 million over five years versus the Panel's award of some $27 million). This level of fees would represent a 170 percent increase over 1993-1997 fee levels, in an environment in which the Public Broadcasters' revenues have increased solely by 13 percent and their overall music use has remained constant. See generally PB PFFCL at ¶¶ 105-146. As set forth below, the Panel's method of adjustment, which closely tracked that advocated by the Public Broadcasters, was not arbitrary and finds ample support in the record, common sense and the history of relations between the parties.

1. The Panel's Use of 1978, Versus 1976, Revenues

ASCAP and BMI claim that the Panel erred in using the Public Broadcasters' aggregate 1978 revenues as part of its adjustment formula rather than the 1976 revenue data which, they contend, were the data relied upon by the CRT at the time it rendered its decision. See ASCAP Pet. at 5-7; BMI Pet. at 28. The Panel's decision, however, clearly indicates that it considered and rejected using 1976 public broadcasting revenue data as the basis for adjusting the benchmark rate it selected. The Panel noted that its

"approach is predicated upon the fundamental assumption that the blanket license fee set by the CRT in 1978 . . . reflects the fair market value of that license as of 1978." Report at 25 (emphasis added). It is entirely consistent and sensible for the Panel thus to have concluded that it was appropriate from a methodological standpoint to establish a ratio which reflected the relationship between the fee payable in 1978 to ASCAP pursuant to the CRT's decision and the revenues actually generated by the Public Broadcasters during that year. While the Panel was clearly capable of "doing the math" to arrive at a different ratio, based upon 1976 revenue data, it expressly declined to do so, based upon its conclusion that the fees which would subsequently result from an extrapolation of that fee to 1996 would be higher than warranted based upon its review of the totality of the record evidence. See Report at 31. While ASCAP and BMI apparently view the Panel's invocation of its selected methodology as a mechanistic exercise entailing no discretion on the Panel's part (see ASCAP Pet. at 7, criticizing the Panel's "arbitrary adjustments to a supposedly neutral formula"), this, of course, is not the case. So long as the Panel did not commit any legal error, its determinations as to how best to adjust forward from its selected benchmark to reach an economically reasonable outcome should be given deference by the Librarian. See, e.g., DSTRA Order at 25,399 (stating that the Librarian "will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it").[4]

[4] The fact that the CRT may have considered revenue data from 1976 as opposed to 1978 is irrelevant in this context because, as the CRT itself noted, its determination as to a reasonable rate for the ASCAP repertory in 1978 was not based upon the application of a specific formula but, rather, resulted from a congeries of information. See 1978 CRT Decision at 25,070. The Panel properly was interested in the base rate itself, not how the CRT may have gotten there, for purposes of its methodology.

2. Post-1996 Fee Adjustments

Having determined to increase ASCAP's and BMI's combined license fees by some 44 percent over a five-year period, the Panel reasonably concluded that no additional year-to-year increases were warranted. Report at 30. The Panel specifically concluded that the rate resulting from its adjustment forward to 1996 established a reasonable rate further upward adjustment of which would have yielded unreasonably high license fees. Report at 30-31.

The Panel's methodology is, in this respect, consistent with the rate proposals offered by all parties, which uniformly called for level annual payments over the 1998-2002 period without the types of adjustments ASCAP and BMI claim for the first time on this appeal are appropriate. The Panel's determination is further supported by the parties' prior agreements over the last decade, which did not call for annual adjustments. See PB Exhs. 12, 13, 15, 16.

ASCAP nonetheless claims that the Panel was legally obliged to mandate annual adjustments to the fees awarded based on the rationale of the 1978 CRT decision. See ASCAP Pet. at 9-11. To the contrary, the CRT's 1978 determination as to reasonable five-year fee levels, which incorporated certain annual adjustments viewed as warranted on the record there presented, simply did not purport to embody such a requirement as a matter of law. The CRT expressly noted that "the payment schedule adopted should not be regarded as a guide to future rate determinations," nor "preclude active consideration of alternative approaches in a future proceeding." 1978 CRT Decision at 25,069-70 (emphasis added).

The Panel here thus acted well within its discretion in concluding on the record here presented that the very significant rate of increase afforded ASCAP and BMI warranted no further upward adjustment during the license term. No precedent barred that case-specific conclusion. Indeed, there is instructive analogous precedent which squarely supports the Panel's logic. See United States v. ASCAP: In the Matter of the Applications of Capital Cities/ABC, Inc. and CBS, Inc., 831 F. Supp. 137, 165 (S.D.N.Y. 1993)(applying 1991 royalty rate to years 1992 and 1993 based on findings that so proceeding (i) "obviates the need for further scrutiny of statistical data," (ii) "has the manifest advantage of achieving finality" and (iii) results in prices that are a "fair approximation of the royalties reasonably due [in the future]").

3. The Exclusion of Ancillary Revenues

ASCAP contends that it was arbitrary for the Panel to exclude certain ancillary revenues from its calculations (ASCAP Pet. at 7-9), conclusorily arguing that the Panel was somehow obliged to include all manner of revenues in its adjustment -- no matter how removed from the subject matter of this proceeding the activities to which those revenues pertain might be. ASCAP's mechanistic insistence that the Panel follow an all-or-nothing approach to revenue calculations again misconceives the dynamic nature of the rate-setting exercise and the discretion which is reposed in the Panel in fashioning reasonable license fees. The Panel was cognizant that such ancillary revenues exist and expressly chose not to include them in its calculations. Report at 30. The reason is apparent: the ancillary revenues in question have little or nothing to do with the broadcast activities at issue in this proceeding. At trial, this point was acknowledged by ASCAP's own economist, Dr. Peter Boyle. Boyle, Tr. at 1722; see also PB RFFCL at ¶

98; PB Ex. 6. That, over time, the Public Broadcasters may have garnered income from such non-broadcast activities as the leasing of studio facilities or merchandising hardly warrants the inclusion of such revenues as part of a formula designed to approximate changes over time in the reasonable value of broadcast music performances subject to § 118. The Panel common-sensically excluded such revenues from a formula attempting to examine changes in relevant economic circumstances. Report at 30.[5]

4. Measuring Change in Music Use

a. ASCAP and BMI take issue with the Panel's determination, based upon the Public Broadcasters' music use data as well as additional evidence in the record, that overall music use (as measured on a "per hour" basis) has remained fairly constant since 1978. See ASCAP Pet. at 12-17; BMI Pet. at 29-32. While it is true that no data, per se, respecting music use back to 1978 were available, the Panel made a reasonable assumption in this regard based on the record facts identified in its Report. See Report at 31-34. The Panel also acted within its discretion in giving substantial weight to ASCAP's assertion that it was reasonable to conclude that the Public Broadcasters' overall music use had not changed significantly between 1978 and 1990, the first year for which any specific music data were available. Boyle, Final Rev. Written Dir. at 9; see also Report at 32 citing to ASCAP PFFCL at ¶ 152. Although the implications of this

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[5] ASCAP's simplistic "ability-to-pay" reasoning (ASCAP Pet. at 6-7) suffers from the same illogic. It also mistakes the record as to commercial broadcasters' own license experience in asserting that such broadcasters "traditionally" pay a percentage of their advertising revenue to ASCAP. See ASCAP Pet. at 25, n.8. The opposite is in fact true as to all commercial television broadcasters, none of whose blanket license fee payments to ASCAP or BMI are tied to their broadcast revenues. See generally, United States v. ASCAP: Application of Buffalo Broadcasting Co., Inc., Civ. No. 13-95 (WCC), 1993-1 Trade Cas. (CCH) ¶ 70, 153 (S.D.N.Y. 1993) (PB Ex. 3X).

concession are no longer favorable to it, ASCAP cannot now take the Panel to task for relying upon it. For its part, BMI never challenged ASCAP's assertion.

Anecdotal evidence in the record also supports the Panel's conclusion. Specifically, ASCAP's own expert witness on public broadcasting's operations, James Day, noted that public broadcasting's program schedule has not changed substantially in the last two decades. See PB PFFCL at ¶ 174 ("[a] comparison of PBS's current primetime schedule with its program service in 1978 reveals remarkably little change in the series that form the core of its evening schedules") (citations omitted). Such record evidence indicating the relative constancy of programming over time supports the Panel's conclusion that there have not been material changes in public television's overall music use. The evidence adduced with respect to public radio indicates that there has been a shift toward programming formats which make relatively less use of music over the past decade. See PB PFFCL at ¶ 122-129; Jablow, Written Dir. at 7.

b. BMI nonetheless contends that the Panel's conclusion is arbitrary because the data concerning music use ostensibly show that there "was an increase in overall music per hour per station by public broadcasting . . . in the last five years alone . . .." BMI Pet. at 31. This assertion is directly contrary to the Panel's well-supported factual finding that "overall music usage has remained constant in recent years." Report at 32. This conclusion was supported by the Public Broadcasters' music data, which the Panel concluded was the most comprehensive and reliable data presented in this proceeding. Report at 31-32. That data showed that: (i) music use per hour on public television as measured in cues declined over the 1992-1996 period; (ii) while use of music as measured in duration on public television stations only was up seven percent, the duration

of feature uses of music in that medium – which are deemed by both ASCAP and BMI to be the most valuable – declined some 25% percent per hour; and (iii) a review of programming trends on public radio showed uncontroverted evidence of a decline in music use in that medium. See PB PFFCL at ¶¶ 114-146. Based upon these data, the Public Broadcasters' expert economist, Dr. Jaffe, concluded that overall music had not changed materially. Id. Based on the foregoing, BMI's suggestion (see BMI Pet. at 34) that the Librarian adjust BMI's award upward by 10 percent based on data explicitly rejected as unreliable by the Panel lacks merit.

c. Both ASCAP and BMI attack the Panel's conclusion that the Public Broadcasters' music use has not changed since 1978 on the grounds that the Panel examined solely the average intensity of music use (as measured in the number of minutes or cues of music) by the Public Broadcasters and failed to consider increases in the number of public television and radio stations or in the total number of hours of programs broadcast. ASCAP Pet. at 13-17; BMI Pet. at 29-30. These challenges to the Panel's method of measuring music use are inconsistent with ASCAP's and BMI's proffered methodologies at trial, which, consistent with the Panel's approach, measured music use and changes thereto based upon the average intensity of music per hour. Moreover, since the Panel's conclusions already implicitly account for changes in the number of stations and broadcast hours, adopting ASCAP's and BMI's newly proposed theories of music measurement would result in windfall payments to them.

Each of the parties below sponsored fee-setting methodologies which analyzed the levels of music used by the Public Broadcasters based upon the average intensity of music per hour of programming. The Public Broadcasters proposed fees which were

based upon evidence which showed that (i) the average number of minutes and cues of music use per hour of public television programming had remained constant over a period of years and (ii) the level of resources devoted to broadcasting such hours -- as measured in programming expenditures -- had grown by some seven percent. PB PFFCL at ¶¶ 114-146. ASCAP and BMI similarly presented fee proposals which measured the intensity of the Public Broadcasters' music use on a per hour basis (see generally Final Revised Testimony of Dr. Peter Boyle and Appendix B thereto; Written Direct Testimony of Dr. Bruce Owen); however, to derive a fee for the Public Broadcasters, ASCAP and BMI compared the resulting measures of music use to purportedly similar measures for commercial broadcasters.

The Panel ultimately adopted a methodology which was comparable to that proposed by the Public Broadcasters, determining an appropriate base fee (the 1978 CRT fee)[6] and adjusting this fee to account for changes in the intensity of the Public Broadcasters' music use (which the Panel determined remained constant over time, see Report at 31-32) and revenues (as opposed to programming expenditures). In this regard, the Panel specifically noted that its use of changed revenues to adjust base fees acted as a proxy for several other factors reflecting changes in the value of the music performing rights being licensed, including, inter alia, audience share, programming expenditures, and inflation. Report at 27-28 (noting that its list of adjustment parameters was non-exhaustive). To the extent that there have been increases in the number of hours of

[6] It is solely this aspect of the Panel's methodology, viz., its selection of 1978 as the base year for adjustment, as opposed to a more recent year reflecting the parties' subsequent voluntary license agreements reached under the auspices of § 118, that gives rise to the Public Broadcasters' Petition.

programming actually broadcast over time, or the number of public television and radio stations, the Panel's methodology accounts for any such changes through its change-in-revenue factor, which the Panel regarded as an all-encompassing measure of change in the operational scale of public broadcasting.

ASCAP's and BMI's proposal to further adjust the 1978 base year fee to account for growth in the number of broadcast hours is inconsistent with the internal logic which underlies the Panel's methodology. To the extent that the Public Broadcasters are making a greater number of public performances of ASCAP and BMI music on an aggregated basis today as compared to 1978, the Panel's methodology accounts for such changes through measuring the inevitably larger system revenue which would have resulted from such growth. The sole relevant music growth measurement separately to be accounted for is -- as all parties recognized at trial -- whether the intensity of use of music has changed over time. The Panel, as noted, determined that it had not.

ASCAP's and BMI's proposal thus may be seen to invite a classic case of "double-dipping" whereby each organization would unjustifiably garner a fee increase based upon changes in revenues as well as changes based upon an ill-defined increase in "overall" music use measured by the very same indicia as drive revenues. ASCAP's and BMI's reasoning is fallacious and should be rejected by the Librarian.

5. Changes in ASCAP's and BMI's Relative Music Use Shares

In fashioning reasonable fees, the Panel properly concluded that ASCAP's share of music use on Public Broadcasting has declined from approximately 80 percent in 1978 to about 60 percent in 1996 (with commensurate growth in BMI's share from 20 percent to 40 percent). Report at 31-34. ASCAP and BMI nonetheless claim on appeal that the

record evidence was insufficient to draw conclusions regarding the parties' respective music use shares in 1978. ASCAP Pet. at 17-18; BMI Pet. at 40. This is simply not the case. The Panel logically explained its reasoning as follows:

> Since 1981, both ASCAP and BMI negotiated fees which consistently reflect relative shares of about 80%-20% of the music use by Public Broadcasters . . . we are persuaded that the consistent division of fees reflects the parties' perceptions of respective music use shares, as confirmed by data available to each party. In the absence of more reliable indicators, the Panel can reasonably presume that the same 80%/20% music use shares that prevailed since 1982, also applied four years prior, in 1978. Indeed, we note that in its trending formula, ASCAP did not hesitate to use its music data from 1990 as a proxy for 1978.

Report at 33 (citations omitted). The logic of the Panel's assumption was confirmed by BMI's own witness, Marvin Berenson, who testified in no uncertain terms to the fact that BMI's negotiations with the Public Broadcasters were consistently based upon BMI's desire to receive compensation in direct proportion to its relative music use share. See Berenson, Tr. at 2621-23, 2660, 2666, 3460. This conclusion, grounded in record evidence (including the parties' prior agreements) and reasonable inferences therefrom, was not arbitrary and should not be disturbed by the Librarian. See, e.g., PB Exhs. 11 – 16; Jameson, Written Dir. at 5-6; ASCAP PFFCL at ¶ 116.

ASCAP's further assertion that the Panel's determination was in error because ASCAP itself did not consider music share as relevant for purposes of fee setting (ASCAP Pet. at 17-18) is beside the point.[7] ASCAP's music share as of 1978 is relevant

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[7] Whether or not ASCAP in the past considered its relative music share relevant during negotiations with the Public Broadcasters, the record is replete with evidence that the Public Broadcasters considered this issue to be of critical importance in every negotiation, such that ASCAP and BMI would receive fees in proportion to their relative negotiation. See Report at 32-36.

as a data matter to allow appropriate adjustment to an extrapolated ASCAP fee today — and avoid ASCAP's recouping a windfall by receiving fees based on an overstated present "market share."

Equally untenable is ASCAP's assertion that the Panel's determination was arbitrary due to the lack of hard data concerning the ASCAP's and BMI's respective share of musical performances on public radio. See ASCAP Pet. at 18-19. The Panel properly recognized that such data were not proffered by any party. It nonetheless concluded, based upon its review of the record, that music share information respecting public television provided a sufficient basis for fee-setting purposes. As noted by the Panel, this decision was firmly based on record evidence which indicated that the parties had historically relied upon music share data for television "as a proxy for music use on public television and radio combined . . .." Report at 32, n.42. Again, while ASCAP may claim that it did not abide by such understandings, the Panel, in the proper exercise of its discretion, clearly chose to credit contrary evidence in the record. Id.

ASCAP's remaining argument — that the Panel erred in adopting a methodology which deprived ASCAP of its asserted right to receive an individualized valuation of its repertory — is factually and legally flawed. The Panel's methodology did, in fact, adjust prior ASCAP license fees in light of changed economic and music use circumstances, thus granting ASCAP the individualized rate-setting it sought. In any event, the Panel correctly rejected the legal basis for ASCAP's claim, observing:

> [B]oth ASCAP and BMI argue that the type of methodology we advance here is impermissible, *as a matter of law*, because Section 118 requires that separate fees be set for ASCAP and BMI that are based upon separate evaluations of their respective licenses. The legislative history behind Section 118, they argue, proscribes any methodology that yields a combined fee, after which the combined fee is divided between ASCAP

> and BMI. The Panel finds no support whatever for this position in the legislative history of Section 118, the express language of the statute itself, or in the 1978 CRT decision cited by ASCAP. It is undisputed that the statute requires the Panel to set separate fees for ASCAP and BMI but that is an obligation wholly distinct from the methodology we employ to determine those fees.

Report at 35-36(emphasis added).

The Panel's ruling is also entirely consistent with the Copyright Office's prior finding that the Public Broadcasters' proposal to set a collective fee was not barred under the Act. See Order of the Copyright Office in 96-6 CARP NCBRA, dated December 9, 1997 at 8 (denying ASCAP's motion to strike the Public Broadcasters' collective fee proposal). Indeed, the Copyright Office specifically noted that "it is up to the CARP to determine which methodology is most appropriate for determining the Public Broadcasters' royalty obligation under section 118." Id. We respectfully submit that both the Copyright Office and the Panel have correctly resolved this matter.

POINT II

ASCAP'S AND BMI'S CONTENTION THAT THE PUBLIC BROADCASTERS ARE NO DIFFERENT THAN COMMERCIAL BROADCASTERS FOR FEE SETTING PURPOSES IS INSUPPORTABLE

A. In a continuing effort to obtain vast fee increases from the Public Broadcasters, the ASCAP and BMI Petitions directly and indirectly seek to tie the Public Broadcasters' §118 license fees to those of their commercial broadcasting counterparts. They do so directly by proposing that the Public Broadcasters pay license fees at the same percent of revenue as do their commercial broadcast counterparts. ASCAP Pet. at 21-25; BMI Pet at 40-56. They do so indirectly by castigating the Panel for failing to

give due regard in its methodology to the increased "commercialization" of public broadcasting.

Based upon a wealth of record evidence (including its appraisal of virtually the entirety of ASCAP's direct and rebuttal cases), the Panel rejected the commercial broadcasting analogy, recognizing that there exist fundamental differences between the commercial and non-commercial broadcasting industries. While ASCAP and BMI attempt to trivialize these salient distinctions, the record makes plain that in their respective missions, economic premises and funding sources, public broadcasting, on the one hand, and commercial broadcasting, on the other, are night and day. See generally PB RFFCL at ¶¶ 66-78; PB PFFCL at ¶¶ 160-167.

As set forth in detail in the Public Broadcasters' Proposed Findings, these differences include the following:

> Mission: The Public Broadcasters' mission is to provide culturally enriching and educational programming irrespective of concerns as to commercial viability. PB PFFCL at ¶¶ 31-34; PB RFFCL at ¶¶ 66-67. This mission derives from Congress's determination – as evidenced by the unique treatment afforded the Public Broadcasters under §118 – that it is in the interests of the American people to sustain a public broadcasting system separate and apart from commercial broadcasting. PB PFFCL at ¶ 161.
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> Economics: The Panel expressly found from an exhaustively-developed record on this point that the economic model which drives public broadcasting is profoundly different from that applicable to commercial broadcasters. Report at 24; see also PB RFFCL at ¶¶ 68-71; PB PFFCL at ¶¶ 163-167. Public Broadcasters engage in a constant struggle to obtain sufficient funding to produce programming which is consistent with their mission objectives. In the noncommercial sector the objective of fund-raising is to locate funding sufficient to support worthy programs. PB RFFCL at ¶ 69. In contrast, commercial broadcasters are driven by a business model in which the objective is to attract the largest possible number of viewers in order to sell advertising time at the highest possible rate. Id. As the Panel correctly noted, commercial broadcasters, which secure advertising dollars in a competitive marketplace, can pass along costs to advertisers. Report at 24; PB PFFCL at ¶¶ 163-164. Jaffe Written Reb. at 15-17; Jaffe, Tr. at 1972-73, 2271-73. No comparable economic mechanism exists for Public Broadcasters. Id.

These salient economic distinctions have direct relevance to the respective mediums' valuation of, and ability to pay for, music in the ASCAP and BMI repertories. See PB RFFCL at ¶181.

Funding Sources: As the Panel noted, the Public Broadcasters derive their income through a variety of sources -- public and private -- in comparison to a commercial broadcasting industry which relies almost exclusively on the sale of advertising. Report at 24; PB RFFCL at ¶¶ 72-73.

Underwriting Support: ASCAP's and BMI's protestations notwithstanding, the income which public broadcasting garners from corporate sponsors is not the functional equivalent of commercial advertising, and the Panel so recognized. See Report at 24 (""though corporate underwriting may superficially resemble advertising . . . the relevant economics are quite different"). In this regard, FCC underwriting rules, together with PBS's and NPR's own more stringent guidelines, have the effect of distinguishing fundamentally both the process by which business support is obtained, and the content of the messages themselves, from commercial advertising practice. PB RFFCL at ¶¶ 74-78.

The profound differences between the missions and economics of public and commercial broadcasters are not altered by the fact that, in recent years, the Public Broadcasters, as a matter of survival, have had to become more innovative and entrepreneurial. As the trial record attests, the Public Broadcasters' mission — "to provide programming which educates [and] informs and culturally enriches the general public" -- has not changed. Jablow, Tr. at 1634, 1961-63; see also Downey, Tr. at 1972-73.

Neither are these profound distinctions made less relevant for fee-setting purposes by simplistic observations of the type offered by BMI -- which proposes to equate the Public Broadcasters with their commercial counterparts based upon the fact that both industries are engaged in the over-the-air broadcast of programming which contains music (see BMI Pet. 42-46). To the contrary, it is precisely because the economics underlying these respective industries are so different that such facile analogies were rejected by the Panel.

B. That the record in this proceeding reflects little concerning the fees paid by public broadcasting in connection with other programming elements (see BMI Pet. at. 47) does not diminish the significance to the fee-setting process here of the foregoing salient distinctions. As a factual matter, given that this proceeding entails a determination solely of the value of music performing rights for public broadcasting entities operating under §118 of the Act, it is unsurprising that little evidence of the Public Broadcasters' contractual relationships with, inter alia, producers, directors, writers, choreographers and the like was adduced by either side. Such evidence would have been utterly beside the point. It is no more appropriate to tax the Public Broadcasters with a negative inference from an absence of record evidence demonstrating that they pay significantly less for other programming inputs than it would be to allow them a positive inference from the equivalent absence of record evidence from ASCAP or BMI demonstrating that such other creative inputs are paid at levels comparable to commercial broadcasting. Further, whatever the "free marketplace" may bring about in terms of public broadcasting's dealings with other creative elements, §118 embodies its own mandated balancing of reward to copyright owners, on the one hand, and encouraging the continued growth of public broadcasting, on the other. That balancing is not meaningfully informed by experience outside of §118's licensing framework. ASCAP's and BMI's Petitions nowhere address this salient distinction.

C. ASCAP and BMI criticize the Panel for not giving greater weight to the so-called "private revenues" earned by the Public Broadcasters. By artificially compartmentalizing the Public Broadcasters' income sources into "private" versus "public" and plugging their preferred view of public broadcasting's economics into the

Panel's methodology, ASCAP and BMI are able to ratchet the Panel's award upward by as much as 70 percent. BMI Pet. at 38, 57-58; ASCAP Pet. at 25.

The ASCAP and BMI critique does little more than demonstrate the potential to arrive mathematically at virtually any "reasonable" fee level provided you are using the "right" underlying data. But "private revenues" are not the right data, as the Panel correctly concluded. Report at 24. Indeed, at trial, BMI's economist, Bruce Owen, explicitly rejected resort to a private revenue concept for fee-setting purposes – a conclusion agreed with by the Public Broadcasters' own expert. See Owen, Tr. at 1503, Jaffe, Tr. at 2941-45. It is particularly telling on this appeal that BMI, which rejected private revenues as an analytic premise for fee-setting at trial now embraces them in its attack on the Panel's methodology.

D. BMI also would make much of one answer provided by one composer witness, Mr. Bacon, pertaining to his own experience in negotiating "upfront" fees which are not the subject of the § 118 compulsory license (because such fees relate to the production of original music which can only be contracted for with the consent of Mr. Bacon). BMI Pet. at 44, 47. BMI proposes to extrapolate from this limited testimony the broad conclusion that "Public Broadcasters generally pay the same rates as commercial broadcasters for other programming inputs." BMI Pet. at 47. Given that Mr. Bacon did not even presume to generalize from his own experience as to other composers, let alone

the universe of creators of programming inputs, BMI's conclusion is bereft of record support. See PB Pet. at 18-19.[8]

E. Finally, as a matter of law, prior CARP and CRT decisions do not, as ASCAP and BMI suggest, require that that commercial rates must be used as a benchmark . See ASCAP Pet. at 21-22; BMI Pet. at 48-49. The cited precedents merely indicate that it is within a Panel's discretion to consider any of a number of potential benchmark for purposes of establishing a reasonable fee. However, as the language quoted by ASCAP specifically notes, a Panel is not obligated to accept such analogies for fee setting purposes. To the contrary, these decisions make it clear that the Panel may properly reject use of a particular benchmarks in light of "distinguishing features among various analogous situations affecting the weight and appropriate thrust of the evidence..." See Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1157 (7th Cir.), cert.denied, 459 U.S. 907 (1982). (Indeed, in the "jukebox" rate adjustment proceeding cited to by ASCAP, the CRT explicitly rejected ASCAP's claim that the Tribunal was bound to set a rate within the zone of fees ASCAP claimed was reasonable based upon contemporaneous "marketplace" analogies. Id.) A review of the Panel's decision indicates that, consistent with this precedent, it considered

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[8] BMI also cites as evidence of an inequitable "subsidy" the disparity in the royalties Mr. Bacon receives as between performances of his music on public as opposed to commercial broadcasting. See BMI Pet. at 7, 47. A review of Mr. Bacon's testimony reveals that this disparity has never been a matter of consequence to Mr. Bacon, who has been, and remains, content to compose music for public broadcasting within the existing economic parameters. Bacon, Tr. at 1608-09. As discussed by Dr. Jaffe, Mr. Bacon's continued willingness to compose for public broadcasting despite this disparity is, in fact, compelling evidence that current license fees do not represent a subsidy. PB PFFCL at ¶¶ 180-182.

and rejected an analogy to the commercial marketplace for fee-setting purposes here based upon such distinguishing features.[9]

Moreover, both the text of §118 itself, as well as recent precedent, make clear that prior agreements between the parties themselves – as opposed to analogies to marketplaces with marketedly different economics – are a vastly preferable benchmark for fee-setting purposes. See PB Pet. at 11-12; PB RFFCL at ¶¶ 2-5; DSTRA Order at 25,409 (finding that agreement reached between parties subject to §118 compulsory licensing result in " a reasonable rate which inevitably affords fair compensation to all parties"). Accordingly, as set forth in detail in the Public Broadcasters' Petition, the prior agreements between the parties themselves are the most appropriate benchmark for setting fees in this case.

In sum, the record evidence overwhelmingly supports the Panel's conclusion that commercial rates are not an appropriate benchmark for fee-setting purposes. ASCAP's and BMI's efforts -- directly and indirectly -- to reinstate their fee proposals, predicted on this notion should be rejected by the Librarian.

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[9] Neither do the Public Broadcasters' references to the commercial marketplace in the context of the recent proceeding to establish compulsory license rates for satellite distributors support the use of a commercial analogy here. See BMI Pet. at 45. As Ms. Jameson testified, that proceeding concerned the value to satellite broadcasters to have available to them the PBS programming service – a matter wholly unrelated to the issue here, namely the value of public performance rights to the music use contained in the Public Broadcasters' programming. See Jameson, Tr. at 2678-2681.

POINT III

THE PANEL ACTED WITHIN ITS DISCRETION IN DETERMINING THE ALLOCATION OF COSTS AND FEES

ASCAP, but not BMI, appeals from the Panel's determination that fees in this proceeding are to be divided on a three-way basis among ASCAP, BMI and the Public Broadcasters. Notwithstanding ASCAP's multi-page assault on this determination, the law on this issue could not be plainer. Section 8.02 (c) of the Act, together with 17 C.F.R. § 251.45(a)(1), vest the Panel with total discretion in deciding this issue. These sections state simply that "[t]he parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the panel shall direct." (emphasis added).

ASCAP's suggestion that the Panel failed to follow prior decisions of the Librarian, as well as of CRT and CARP panels, reflects a misreading of § 802(c) of the Act, which plainly intends such sources of precedent to have relevance in connection with determinations made by CARP panels in carrying out the purposes set forth in § 801. Section 801, in turn, makes plain that such precedents bear on the rate-setting process itself, not the Panel's ancillary duty to determine allocation of costs among the parties.

In any event, the only CARP precedents cited by ASCAP are inapposite since, as ASCAP itself recognizes, the parties themselves agreed upon, and recommended to those Panels, the division of costs reflected therein. To suggest, as ASCAP does, that such consensual determinations constitute binding precedents is frivolous.

Even were the Panel's costs determination subject to review by the Librarian, it is evident that the Panel adopted a reasonable sharing of costs among the parties. As its report makes clear, the Panel, as one would expect, took into consideration a range of

factors including the 1978 CRT decision, the history of negotiations between the parties and the manner in which the parties proceeded herein. Report at 39. It was, we submit, eminently reasonable for the Panel to require a three-way sharing of costs in circumstances in which each of the parties so taxed put on its own case and filed its own pre-and post-trial submissions. It was, likewise, eminently reasonable for the Panel to allocate costs as it did in circumstances in which ASCAP and BMI (i) presented their own witnesses (thirteen by ASCAP on its case-in-chief and three on rebuttal, and six by BMI on its case-in-chief and three on rebuttal, as compared with only four by the Public Broadcasters on their case-in-chief and two on rebuttal); and (ii) proffered different, and sometimes contradictory, evidence (e.g., concerning the issue of music use).

Accordingly, the Panel's decision as to cost allocation should be left undisturbed.

CONCLUSION

For the foregoing reasons, the Public Broadcasters respectfully submit that ASCAP's and BMI's Petitions be denied and that the Panel's award of costs be affirmed. In addition, for the reasons set forth in the Public Broadcasters' Petition, we respectfully request that the Librarian modify the Panel's determination by adjusting the total royalty rate set forth therein downward to reflect a proper consideration of the prior agreements between the parties.

Respectfully submitted,

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The Corporation For Public Broadcasting**

Date: August 19, 1998

Before the
Library of Congress
Washington, D.C.

In the Matter of	)	
	)	
Adjustment of the Rates for	)	Docket No. 96-6
Noncommercial Educational	)	CARP NCBRA
Broadcasting Compulsory License	)	

CERTIFICATE OF SERVICE

I am an associate at Weil, Gotshal & Manges LLP. I caused to be served on August 19, 1998 true copies of the Public Broadcasters' Reply to the Petition of the American Society of Composers, Authors and Publishers To Modify The Report Of the Arbitration Panel, Dated July 22, 1998 and The Petition of Broadcast Music, Inc. To Set Aside Or, In The Alternative, Modify The Panel Report Dated July 22, 1998 as well as the Public Broadcasters' Reply to SESAC Inc.'s Petition to Modify Determination of the Panel as follows:

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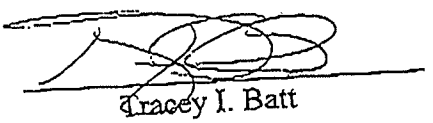
August 19, 1998



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August 19, 1998

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Re: Noncommercial Educational Broadcasting Compulsory License (Docket No. 96-6 CARP NCBRA)

Dear Mr. Billington:

Enclosed please find an original and five copies of the Public Broadcasters' Reply to the Petition of the American Society of Composers, Authors and Publishers To Modify The Report Of the Arbitration Panel, Dated July 22, 1998 and The Petition of Broadcast Music, Inc. To Set Aside Or, In The Alternative, Modify The Panel Report Dated July 22, 1998 as well as the Public Broadcasters' Reply to SESAC Inc.'s Petition to Modify Determination of the Panel, both dated August 19, 1998. The original Certificate of Service will be hand delivered tomorrow.

Respectfully submitted,

R. Bruce Rich

R. Bruce Rich

Enclosures
cc: Counsel of Record
Henry R. Kaufman, SESAC, Inc.

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